PROTECTION OF THE CONSUMER IN NEW ZEALAND— SOME RECENT DEVELOPMENTS

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Consumerism, like environmentalism, has become something of a modern fad. The once vaunted doctrine of laisser-faire has become the subject of repeated attacks by Governments sensitive to public pressure. The United States, with its Truth in Lending Act, the United Kingdom, with its Trade Descriptions Act, each bear ample testimony to this. Our purpose now is to discover whether this overseas trend has affected the laws of the Dominion.

A Brief Look Back

New Zealand (as with many other Common Law countries) points to the Sale of Goods Act, 1908, as providing the legislative basis for the modern doctrine of consumerism.[1] Here, of course, no new law was attempted; rather the statute attempted to consolidate the case-law which had grown up during the nineteenth century. It was, as Atiyah has said "a codifying statute."[2]

As represented by this piece of legislation, the law was earliest concerned with the terms and conditions of the contract itself. Thus, ss. 15-17 were designed to ensure that goods which are the subject of a contract of sale measure up to a reasonable quality and standard of fitness: such goods must comply with their description, be of merchantable quality; and be reasonably fit for their intended use.[3] Failure to observe these requirements allows the buyer to repudiate the contract and sue the seller on the basis of non-delivery.[4] Alternatively, the buyer may retain the goods and sue the seller for any damages which the breach may have caused him.[5]

Not that the Sale of Goods Act confined itself to demanding that goods meet various standards of fitness. There was also provision (contained in s. 14) that when the seller sold the goods, he must, in fact, have been in a position to pass good title, free of any defects, to

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1 This Act, except for some slight differences not relevant here, reproduces the Sale of Goods Act, 1893 (U.K.).

2 The Sale of Goods (4th ed., 1971) 1.

3 These requirements were each the subject of considerable discussion in the case of *Ashington Piggeries Ltd.* v. *Christopher Hill; Christopher Hill* v. *Norsildmel* [1971] 2 W.L.R. 1051.

4 See s.52 of the Sale of Goods Act, enshrining the decision in *Rodocanachi* v. *Milburn* (1886) 18 Q.B.D. 67.

5 See ss.54 and 55 of the Sale of Goods Act, enshrining the famous rule in *Hadley* v. *Baxendale* (1854) 9 *Ex. 341.* Section 13(1) allows the buyer this option. The choice can, however, be made for him since, under the terms of s.13(3) the buyer will be compelled to retain goods if he has accepted them or the property in them has passed to him. In such situations, he may sue for damages only.

the buyer. Any breach of this term gave the buyer the right to those remedies described above.[6]

It is at this point that another statute becomes relevant to the study of consumerism, namely, the Mercantile Law Act, also passed in 1908.[7] Recognition had long been given to the fact that, when an innocent purchaser buys goods from a person with no right to sell, the need to protect commercial transactions might prevail over the rights of the true owner.[8] The Sale of Goods Act agreed that the true owner could, by his conduct, preclude himself from asserting his title.[9] And it also stated that the innocent purchaser was able to, on appropriate occasions, acquire an unimpeachable title through the operation of the Mercantile Law Act.[10] It is, indeed not difficult to find recent illustrations of the true owner's title being ousted because his property was sold to a bona fide purchaser by a mercantile agent.[11]

Gaps to be Filled

From the consumer's point of view, this early legislation was generally treated kindly. For example, the pre-condition that s. 16(a) would apply only where there had been a reliance on the seller's skill and judgment was found to be easily capable of satisfaction.[12] Similarly, the proviso to that section which excluded liability where goods were bought under a "patent or other trade name" was given only a very restricted and limited ambit.[13]

Finally, there was that very important judicial creation, the doctrine of "fundamental breach". Herein it was argued that, while s. 56 of the Sale of Goods Act conceded to parties the right to exclude all, or any, of the implied terms, these "exclusion clauses" would be of no avail

6 If the breach was of s.14(b) or 14(c), that there is implied a *warranty* that the buyer has quiet possession of the goods, or that the goods are free of any unrevealed encumbrances, then, of course, a claim could only be for damages.

7 Modelled on the Factors Act, 1889 (U.K.).

8 See Denning L. J. in *Bishopsgate Motor Finance Corpn.* v. *Transport Brakes, Ltd.* [1949] 1 K.B. 332, 336-7.

9 Section 23(1). At one time, it was suggested that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it"; *Lickbarrow* v. *Mason* (1787) 2 T.R. 63, 70 per Ashurst J. Such a wide ambit to the doctrine of estoppel, however, has never been tolerated: *Dexter* v. *Mitcalfe* [1938] N.Z.L.R. 804, 806 per Ostler J.; *Paris* v. *Goodwin* [1954] N.Z.L.R. 823, 832 per Turner J.; *S.I.M.U.* v. *Whitwell* [1959] N.Z.L.R. 251, 258-9 per Haslem J. See too *Mercantile Credit Co.* v. *Hamblin* [1964] 3 All E.R. 592 (C.A.).

10 Section 23(2)(a) of the Sale of Goods Act. Section 3(1) of the Mercantile Law Act allows the bona fide purchaser to obtain a good title where a mercantile agent, who has possession of the owner's goods with his consent, sells them in the ordinary course of his business. According to s.2 of that Act a mercantile agent is one whose normal business as an agent is the buying or selling of goods or raising money on the security of goods.

11 Illustrative decisions include: *Dexter* v. *Mitcalfe* [1938] N.Z.L.R. 804; *Paris* v. *Goodwin* [1954] N.Z.L.R. 823; *Davey* v. *Paine* [1954] N.Z.L.R. 1122; *Tingey* v. *Chambers* [1967] N.Z.L.R. 785. See too *Pearson* v. *Rose and Young* [1951] 1 K.B. 282; *Astley Industrial Trust* v. *Miller* [1968] 2 All E.R. 36; *Belvoir Finance Co. Ltd.* v. *Cole and Co. Ltd.* [1969] 2 All E.R. 904.

12 See *Grant* v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85, 99 per Lord Wright. It has been held recently that even a partial reliance on the seller will be enough: *Kendall* v. *Lillico* [1969] 2 A.C. 31.

13 See *Bristol Tramway Co. Ltd.* v. *Fiat Motors Ltd.* [1910] 2 K.B. 831; *Baldry* v. *Marshall* [1925] 1 K.B. 260.

where the breach was such as to amount to a failure to "perform the fundamental obligation by the contract".[14] Although this curial effort on behalf of the purchasing public has lately had certain fetters imposed upon it,[15] evidence of its continued vigour is still to be found.[16]

There was, even so, a great deal lacking in consumer protection. It was really not so much the likelihood of implied terms being excluded by the contract, but rather that fact that, for certain areas in the field of buying and selling, the Sale of Goods Act attempted no legislative intervention whatsoever.

It must be remembered, of course, that that Act was based on an economy very different from that of the latter half of the twentieth century. But this was small consolation to the buyer faced now (as he was not in earlier days) with the fruits of mass production and techniques of mass persuasion. Mass production entailed an abundance of goods but (generally) a fixed level of price.[17] Bargaining over price, whilst once a common phenomenon, became very much the exception. Mass persuasion, on the other hand, denoted both those subtle and far from subtle campaigns waged by the advertiser in his herculean efforts to dispose of produce. It is the recent efforts of the New Zealand legislature to provide consumer protection in each of these fields to which we must now turn our attention.

(i) Controlling the Price

It is an essential feature of a contract for the sale of goods that the buyer pays a money consideration—"the price"—to the seller.[18] If no price is stated, the buyer must, according to s. 10(2) of the Sale of Goods Act pay "a reasonable price". This, sub-section (3) stipulates, is "a question of fact".[19]

But is this to say that, when a fixed price is nominated, the seller can charge any (including an unreasonable) price? The answer is that he cannot, since s. 23(1) of the Control of Prices Act 1947, states that an offence is committed should goods be sold "at a price which is unreasonably high."[20] What is "unreasonably high" is a matter of fact, to be determined by the Court, but assistance is given by sub-section (2) which declares that an "unreasonably high" price is one which produces "more than a fair and reasonable rate of commercial profit" to the seller.

There are few Court decisions dealing with profiteering. In an unreported decision of the Supreme Court in 1960, it was said to be

14 Atiyah, op. cit. p. 31 Illustrative decisions include *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit, Ltd.* v. *Apps* [1962] 2 Q.B. 508.

15 *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; see Coote, "The Rise and Fall of Fundamental Breach" (1967) 40 A.L.J. 336.

16 *Harbutt's Plasticine Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 All E.R. 225; *Farnsworth Finance Facilities Ltd.* v. *Attryde* [1970] 2 All E.R. 774. See also Coote, "The Effect of Discharge Breach on Exception Clauses" (1970) C.L.J. 22.

17 It has also meant the growth of obtaining goods on credit; see the Report on Instalment Credit Trading in New Zealand by the Tariff and Development Board, August, 1968.

18 See the Sale of Goods Act, 1908 s.3(1).

19 See: *Acebal* v. *Levy* (1834) 10 Bing. 376; *Canterbury Central Co-operative Dairy Co. Ltd.* v. *Self-Help Co-operative Ltd.* [1932] N.Z.L.R. 1574 (C.A.).

20 This applies to services also; s.44.

insufficient to show that a charge was high or even very high—it must be unreasonably high.[21]

Just such a position was reached, however in *Department of Industries and Commerce* v. *Crisp*.[22] It was held by the Magistrate in this case that marking up goods to show a profit of between 134.13% and 152.84% was unreasonable. It was, indeed, said to be "unjustified exploitation".[23]

(ii) Controlling the Method of Sale

For the most part, modern consumer law has looked more to regulating the tactics of sale than to the sale itself. This has meant legislation governing such items as misleading labelling or unfair advertising. These matters are governed by two relatively recent statutes, the Food and Drug Act and the Consumer Information Act, each passed in 1969. But, first we shall deal with an equally relevant statute, the Door to Door Sales Act, 1967.

(a) The Door to Door Sales Act

The intent of the Door to Door Sales Act, as one authority has remarked, "is to protect housewives and other persons deciding to buy on *credit* or *hire* goods under pressure by salesmen visiting their homes, or interviewing them at places where the vendor does not normally carry on business".[24] It does not apply to cash sales, nor does it apply to credit-sale agreements under which the total purchase price is less than $40;[25] or to other types of credit agreement under which the total price is less than $20. And the Act does not, under the terms of s. 11, apply to those agreements where "the first inquiry specifically relating to the sale and purchase of the goods that are the subject of the agreement is made by the purchaser".[26]

The mechanics of consumer protection stipulated in the Door to Door Sales Act constitute, in effect, a deliberate disavowal of established contractual principles. Section 7 states that the purchaser who obtains goods elsewhere than at "appropriate trade premises" is to be granted a seven-day period of reflection.[27] If, during that week, he or she decides

21 The only reference to this is "Consumer" (Wellington), June, 1971, p. 148. It neither cites the parties nor identifies the judge.

22 (1967) 12 M.C.D. 254.

23 *Ibid.*, at p. 258 per Luxford S.M. Reference might also be made here to the Trading Coupons Amendment Act, 1969. This prohibited that type of promotional scheme where retailers would distribute "stamps" with goods, and later redeem the stamps for various items, such as toys or trips overseas, depending on the number of stamps redeemed. One of the reasons for prohibiting this scheme was its tendency to inflate prices, or, at least, to prevent them from being reduced.

24 Leys and Northey, *Commercial Law in New Zealand* (4th ed. 1969) p. 342; emphasis added. Excluded from the provisions of the Act are sales of mammals, birds or perishable goods; s.2.

25 A credit sales agreement means an agreement "for the sale of goods under which the total purchase price is not paid in full at, or before, the time at which the agreement is made"; s.2.

26 Section 11(2) stipulates that, in determining who made the first inquiry, "the soliciting of a sale by the vendor by way of an advertisement addressed to the public at large or to a section of the public shall be disregarded".

27 The vendor has no defence in arguing that he has, in fact, no "appropriate trade premises"; *Molloy* v. *Castle Steel* [1972] N.Z.L.J. 203.

to resile from the agreement, then it will forthwith be cancelled: it will not matter that the contract would have been to the purchaser's advantage, that it had been negotiated fairly and honestly, or that it conformed in its entirety with the requirements of a binding contract. The consumer is given the right to annul an otherwise entirely valid contract.[28]

Although all attempts to contract out of the Door to Door Sales Act are rendered ineffective by s. 12, the Act could still be rendered valueless were a purchaser not apprised of his privilege of cancellation. Consequently, s. 5 states that no door to door sale can be enforced unless the contract meets with all requirements set out in s. 6: that the agreement is in writing, signed by all the parties concerned; that the customer is given a notice telling him of his right to cancel; and that this is accompanied by a prescribed cancellation form.[29]

An intended sale which ignores *these* conditions is unenforceable; and, according to s. 7(3), the purchaser in such a situation has *one month* to cancel the contract, not seven days. Furthermore, the agreement will only become binding when that month has elapsed *and* the seller has delivered to the customer full particulars of the contract coupled with a notice of his right to cancel, and the cancellation form. The purchaser then has seven days in which to cancel, after the lapse of which period the vendor has an enforceable contract.

Sections 9 and 10 deal with the difficult matter of returning the parties to their former positions once a notice of cancellation has been given. Each party is put under a duty to take reasonable care in regard to those goods of the other held as a result of the agreement. The seller must return to the purchaser all monies and goods which he may have obtained. The purchaser need not return the seller's goods until the seller has returned those in his possession, and then he is obliged to make such return only at his (the purchaser's) premises. The purchaser's duty to take reasonable care of the goods lasts only 21 days after the notice of cancellation except where he actually refuses to turn them over.

It is plain that, in the Door to Door Sales Act, the legislature has provided a substantial measure of consumer protection. Some, indeed, might argue that the consumer has been somewhat over-protected since the Act imperils "the wide extent of legitimate selling which apparently takes place in rural areas".[30] This observer notes that such "legitimate selling" (which means, we may suppose, honest and scrupulous selling) encompasses car sales and the canvassing of newspaper subscriptions. This complaint could be met were the Governor-General to exclude such items from the ambit of the Act under the power reserved to him under s. 4. It is, indeed, instructive to note that the evidence placed before the Tariff and Development Board in its inquiry into hire pur-

28 Such an approach is not without precedent. Contracts made by infants have, both at common law and under statute, traditionally been liable to cancellation simply because they were made by infants, and not because they were somehow defective; see, for example, the Infants Act, 1908; the Sale of Goods Act, 1908; the Minors' Contracts Act, 1969; and see generally Cheshire and Fifoot, *The Law of Contract* (3rd N.Z. ed., 1970) pp. 344-65.

29 In the event of legal proceedings, a court may dispense with these requirements if it finds that the failure to comply is a minor one not acting to the prejudice of the purchaser: s.6(2).

30 See a note by E. H. Flitton on the Door to Door Sales Act, (1968) 3 N.Z. U.L.R. 86, 87.

chase and credit trading in New Zealand[31] referred only to the selling of books.[32] It would, perhaps, for the sake of commerce generally, have been better if Parliament had followed the Board's proposal that the Door to Door Sales Act should contain a schedule listing those goods to which the "cooling off" period was applicable. The Act did, in effect, adopt the opposite position.

(b) The Food and Drug Act and the Consumer Information Act

The Food and Drug Act, and the Consumer Information Act, both passed in 1969, represent a solid commitment to the cause of consumer protection.[33] Neither Act is designed to secure a decent standard of product, save insofar as the former statute makes it an offence to sell food which is unsound, unfit for human consumption, or which contains anything which is harmful or offensive.[34] Rather, the principal aim of these complementary Acts is best described in the preamble to the Consumer Information Act: it makes "provision for informative labelling and marking of goods and for the prevention of deceptive or misleading packaging, labelling, and advertising". Broadly then, these Acts set out on the one hand, to control advertisements, and on the other to control the techniques of packaging and labelling. We shall take each head in turn.

Control of Advertisements

Controlling advertisements has meant, in the light of the Acts we are now discussing, legislative intervention on three fronts, covering: endorsements; advertisements which refer to price; and descriptions of the particular commodity being advertised.

We have, perhaps, all been familiar in the past with the white-coated "scientist" on our screen who lauds some brand of headache-tablet, vitality restorer or whatever. Such endorsements, in New Zealand at any rate, are now a thing of the past. The Food and Drug Act provides, in a reference to medical advertisements,[35] that no advertisement is permitted which indicates that the relevant product has been used or recommended by a person practising any of the following professions:

31 See the Interim Report on Door-to-Door Selling of Books by the Tariff and Development Board, 24 June, 1966.

32 Section 44 of the Mercantile Law Act, in a reference solely to the purchase of books, makes void every contract which does not include a statement of the purchaser's total liability. Nor can a vendor recover under the agreement unless he can produce an acknowledgment by the purchaser that he has received a copy of the agreement. See, as illustrative decisions: *Hamilton Institute* v. *Skoglund* (1929) 24 M.C.R. 107: *Hamilton Institute* v. *Joughlin* (1932) 27 M.C.R. 95. Section 13 of the Door to Door Sales Act allows contracts which might be in accord with the provisions of s.44 still to be cancelled during the cooling-off period. Presumably contracts which offend against the Mercantile Law Act cannot be enforced even if a purchaser does not cancel during the cooling-off period.

33 The Food and Drug Act came into force on April 1, 1970; the Consumer Information Act on June 1, 1970.

34 Section 6(4). These requirements would seem to overlap with s.14(b) of the Sale of Goods Act. See: *Chaproniere* v. *Mason* (1905) 21 T.L.R. 633 (bun containing stone) and an (unreported) case in Auckland where a local cafeteria was fined under the Food and Drug Act for serving a salad containing a cockroach.

35 Section 2 defines a medical advertisement as meaning one "relating or likely to cause any person to believe that it relates to any drug or medical device or method of treatment".

chiropody, dentistry, dental technician, dietitian, medicine, midwifery, nursing, optician, optical dispensing, physiotherapy, pharmacy; also included are those who are engaged in study or research in relation to any of those professions or occupations.[36] The broad terms of this prohibition would seem to outlaw endorsements both by character-actors masquerading as qualified personnel and by persons genuinely qualified. Nor, for that matter, could it be any the more permissible for advertisements to avow (in writing or by the spoken word) that "Doctors recommend X's headache tablets."[37]

The Consumer Information Act offers a slightly different approach. In a reference to goods, services *and* food, s. 9(5) prohibits those advertisements which indicate, *without his consent,* that a particular commodity has been endorsed by a person whom the public expects to be technically qualified to speak on the goods and who is in fact so qualified. Thus, to say that the "New Zealand Rugby Union recommends footballs made by Bloggs" would infringe the law unless that body had in fact consented to the endorsement. But it would not infringe the Act were an advertisement to declare that: "The New Zealand Rugby Union recommends Bloggs' swimming costumes." The reason why no offence is committed would be that no one would expect the Rugby Union to be "technically qualified" to issue recommendations on swim-suits.[38] The question of consent, therefore, would be quite by the way.[39]

Turning to advertisements which mention price, the law covering food, drugs and goods generally is contained in s. 10 of the Consumer Information Act. The general aim of this section is to prevent the public from being duped into buying goods which are allegedly sold at a "special", "reduced" or "sale" rate. If these, or similar expressions, are used to indicate falsely that the goods are being sold at below their normal rate, an offence is committed.[40]

In like vein, sales at "cost price" must be sales at a price which is the same as, or less than, the amount the retailer paid to purchase the

36 Section 10(f)(ii). Paragraph (iii) also makes it an offence to advertise that a therapeutic drug, medical device or method of treatment has beneficially affected the health of a particular person or class of persons whether named or not, and whether real or fictitious.

37 Thus, in an unreported case, it was held unlawful to state: "Your chemist recommends Dettol". However, s.10(f)(ii) does exempt endorsement by a person by whom, or on whose behalf, an advertisement is published or whose services are advertised. Thus, a nurse could recommend her own patent medicine, or a dietitian his own particular method of treatment.

38 This expression "technically qualified" seems to have some grey areas. Who for example, would be technically qualified to speak on hair-cream? Members of the public who use it; or barbers only?

39 Although there is the possibility always of a common law action for defamation. In the well-known case of *Tolley* v. *Fry* [1931] A.C. 333, an amateur golfer was depicted with a bar of Fry's chocolate protruding from his pocket. He had not consented to this endorsement and successfully sued in defamation. It was libel to infer that an *amateur* golfer had been earning money for advertisements. It is also possibly the offence of passing-off to imitate the voice of a famous person in a spoken endorsement: *Sim* v. *Heinz* [1959] 1 All E.R. 547. Reference should also be made to *Krouse* v. *Chrysler Canada, Ltd.* (1972) 25 D.L.R. (3rd) 49.

40 The U.K. Trade Descriptions Act, 1968, s.11(3)(a)(ii) shows a different approach. Where goods are advertised for sale at a price which is below a previous price, this higher price must have prevailed "within the preceding six months for a continuous period of not less than 28 days". See *House of Holland Ltd.* v. *London Borough of Brent* [1971] 2 All E.R. 296.

goods and have them delivered to his premises. And the Act also stipulates that expressions such as "Economy Size" can no longer be employed unless there is some genuine saving to the purchaser in buying the larger, instead of the smaller, size.

When there is a genuine sale of goods at a price below that normally prevailing, the seller must have a "reasonable quantity" of the goods for sale, unless he expressly states the number available. Indeed, if the special price for the commodity is above $30, then he is *obliged* to state the precise number of items available for sale at the cheaper rate. What the law is clearly trying to do here is prevent people from being lured into buying a particular article and then having to pay the full price for it because those at "special rates" have already been snapped up.

The provisions of s. 10 are, on the face of it, strong provisions. But the experience of the past years tends to cast doubt on their efficacy. The Department of Industries and Commerce indicated that the first year of the Consumer Information Act would be regarded as "educative". To the discreet observer, however, this appeared to mean a licence to trade as though the statute had never been passed. Certainly, it seems strange that the following two years have passed with no prosecutions.

Finally, we may turn to consider those provisions of the Food and Drug Act and the Consumer Information Act which attempt to control misleading advertising. Each act, in approximately identical language, prohibits those advertisements which mislead with regard to the "nature, quality, strength, purity, composition, origin, age, or effects" of the commodity being advertised.[41]

For all the undoubted vigour of these provisions, however, one may pause to wonder just how much of an additional weapon they represent in the consumer's armoury.

Certainly, the Food and Drug Act, 1969 represents an advance over the Food and Drugs (sic) Act, 1946, s. 9(1) (c) of which outlawed only those advertisements which were "calculated or likely to deceive a purchaser with respect to the properties of the food or drug". Again, the Consumer Information Act appears to contain a wholly novel safeguard since there had hitherto been no legislation governing the advertising of such commodities as were neither food nor drugs.

The hesitation is rather caused by the possibility that there were already safeguards formulated by the common law.[42] As lawyers will know, it has been held that the terms of an advertisement can be so phrased as legally to constitute an offer, thus capable of acceptance by a purchaser who acts in the faith of the particular promise. In the famous case of *Carlill* v. *The Carbolic Smoke Ball Co.*[43] the defendant company promised anyone who used their smoke balls, and yet caught influenza, the sum of £100. As a surety of their good intentions, the company declaimed in their advertisement that £1,000 had been deposited with their bankers. Mrs Carlill used the balls, contracted influenza, and, after due litigation, obtained the promised £100. The

41 Section 8(3) Food and Drug Act. The Consumer Information Act adds "suitability"; s.9(4). The addition does not seem to be significant.

42 Since neither the Consumer Information Act nor the Food and Drug Act is intended to act as a code these common law remedies about to be discussed are still available.

43 [1893] 1 Q.B. 256 (C.A.).

advertisement was clear and unambiguous, and spelt out, in law, an intention to be bound by the terms of the promise. There was formed, therefore, a contract between the company and Mrs Carlill. It has been well said that this decision "is a red light over the desk of the advertising copywriter".[44]

But whether or not an advertisement in itself gives rise to an offer capable of acceptance, it seems reasonably well established that an action can lie for false statement made in an advertisement. If, for example, goods are purchased from an advertiser, the purchaser being influenced by some representation made in the advertisement, relief may be sought and granted if that representation turns out to be false.[45] The remedies open to the buyer will depend on whether the misrepresentation was innocent or fraudulent.[46]

It also seems possible that an action on misrepresentation will lie even though the item concerned is not purchased from the advertiser. The decision in *Hedley Byrne and Co.* v. *Heller and Partners*,[47] where there was recognition of a right to sue for negligent mis-statement, points out one approach;[48] the decision in *Shanklin Pier Ltd* v. *Detel Products*[49] another.

In this latter case, a director of the defendant firm recommended that the plaintiffs should use the firm's paint when painting their (the plaintiffs') pier. The paint, it was asserted, would have a life of no less than 7 years. A quantity was bought from the manufacturers, not by the plaintiffs, but by their painting contractors. The paint lasted 3 months. It was held that the plaintiffs could sue for breach of contract: the promise that the paint would last for no less than 7 years became

44 E. S. Turner, *The Shocking History of Advertising*, (rev. ed., 1965) 97. P. A. Longdon-Davies has also said that this case "should be engraved on the hearts of all advertising men"; *Modern Advertising Law* (1962) 13. A case similar to that of *Carlill* v. *the Carbolic Smoke Ball Co.* is *Wood* v. *Lectrick Ltd.* (The Times, 13 Jan., 1932). "What is the trouble?" the advertisement ran; "Is it grey hair? In 10 days not a grey hair left. £500 guarantee". After 10 days use, Mr Wood still had his grey hair and so could, decided Rowlatt, J., claim the £500.

45 See *Brooke* v. *Rounthwaite* (1846) 5 Hare 298; *Smith* v. *Land and House Property Corpn.* (1884) 28 Ch.D. 74. On the other hand, no action will lie for mere commendatory "puffs" such as "washes whiter than white", for *"Simplex commendatio non obligat"*. See: *Magennis* v. *Fallon* (1828) 2 Mol. 561; *Scott* v. *Hanson* (1829) 1 Russ and M. 128; *Dimmock* v. *Hallett* (1866) 2 Ch. App. 21.

46 If the misrepresentation becomes a term of the contract, the buyer's remedies will depend on whether it is deemed to be a condition or a warranty. For the former, repudiation will lie, in addition to damages; for the latter damages only. Most conditions, it would seem, have to be treated as warranties since the right to rescind is lost with the passing of property in goods: s.13(3) Sale of Goods Act. For a misrepresentation which is not a term of the contract, repudiation and a claim for damages will lie if the statement was made fraudulently. In the case of an innocent misrepresentation, only recission used to be allowed. However, even this relief may be denied, since it was decided in *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572, and in *Watt* v. *Westhoven* [1933] V.L.R. 458, that such a right had not survived the Sale of Goods Act. But, in the light of dicta in *Leaf* v. *International Galleries* [1958] 1 W.L.R. 753 and *Long* v. *Lloyd* [1950] 2 K.B. 86, this may no longer be good law.

47 [1964] A.C. 465.

48 It is not thought that this proposition is affected by the opinion of the Judicial Committee in *M.L.C.* v. *Evatt* [1971] 2 W.L.R. 23.

49 [1951] 2 K.B. 854.

binding when the painting contractors were ordered to buy. The consideration received by the promisors was the sale of their paint.[50]

In view of all this, it is not inaccurate to say that the net impact of the Food and Drug Act and the Consumer Information Act (at least as regards advertising) is that they lend the weight (and clarity) of a statutorily enacted criminal offence to what has always been a somewhat hazy area of the common law.[51]

Control of Packaging and Labelling

Packaging and labelling law seems to have two aspects; ensuring that certain information is noted on packages; and ensuring that (all else apart) goods are not packaged or labelled in a way that misleads.

Taking first the "informatory" aspect, the Consumer Information Act stipulates, in a wholly new requirement, that all "packagers of goods shall cause the packages to bear a label showing the name and address of the packager or the person on whose behalf the goods were packaged".[52] This of couse, enables the consumer to have an address to which to deliver his complaint.

No such requirement is found in the Food and Drug Act, although it does reiterate an earlier requirement that all medical advertisements must contain the name and address of the advertiser.[53] It is, rather, the Food and Drug Regulations, 1973, which stipulate that a manufacturer has to state on a package containing food or drugs his name and address.

The Regulations are also in point when they show that informatory labelling is not just a matter of identifying the manufacturer in his place of business. It is required, for instance, that packages both of food and drugs refer to the "name", or "description" of the relevant article;[54] while packages of food must state the "net weight or volume or number of the contents of the package".[55]

But it would be wrong to deduce from these preceding paragraphs that informatory labelling is not all within the domain of the Food

50 Ibid. 856 per McNair J. See too *De la Bere* v. *Pearson* [1908] 1 K.B. 280. Neither case offers comparison with the position of a New Orleans dealer who, in 1900, sent toothache drops to an agent in Chile. The drops were warranted to work in 10 minutes. The first customer to try the product did so on the spot; found they did not work; and had the agent arrested. He was fined $1,000 and given a 3 month sentence; Turner, *op. cit.* p. 97.

51 The Consumer Information Act, s.18, stipulates a maximum fine of $200, or $500 if *mens rea* is present. If the offence is a continuing one, a maximum fine is prescribed of $10 for each day. Section 39 of the Food and Drug Act lays down a maximum fine of $200 or $500 together with a maximum 3 month sentence if the offence is knowingly committed.

52 Section 3(i).

53 Section 9(1). This repeats s.10 of the Medical Advertisements Act, 1942. Thus, in an unreported case, the journal "Truth" was fined for publishing an advertisement headed: "Congested Bowels". This article set forth a remedy for this ailment as prescribed by an old age pensioner. His address was not given and so an offence was shown.

54 Regulations 5 and 238.

55 Regulation 5. The Poisons Regulations, 1964, require labels to state certain "cautionary" information; while orders made under the Merchandise Marks Act 1954, require footwear, clothing and dry cell batteries to indicate their country of origin. The Weights and Measures Act, 1925, and the Weights and Measures Regulations, 1926, also contain requirements as to marking net weight or measure on packages.

and Drug Act. Indeed, this may ultimately prove to be one of its more valuable contributions to the field of consumer protection. Section 46 provides no less than 26 purposes for which regulations may be made, although not all of these relate to labelling requirements.[56] Among those that do, regulation (l) is a noteworthy example: where a package indicates that the food it contains provides a specific number of portions of servings, "the label shall also bear a statement giving particulars of the quantity of each purported portion or serving, by weight or volume, when ready for consumption".[56(a)]

The Consumer Information Act (thus perhaps befitting its title) similarly concedes the power to issue regulations, if on a less grandiose scale than allowed by the Food and Drug Act. Section 5 permits the issuance of regulations stipulating, for instance, that directions as to use appear on the label; or the date by which the goods must be used. No regulations have yet been made under this section, but the Minister of Industries and Commerce has invoked the power given to him under s. 4 of the Act to specify those products which must bear a label showing the quantity of goods contained in the package.[57]

The problem of controlling deceptive or misleading packaging or labelling is comprehensively controlled by both our Acts; between them they outlaw virtually every and any form the offence could take.[58] Insofar as coverage is given outside the realm of food and drugs, such protection is new. But the Food and Drug Act largely repeats s. 6 of the Food and Drugs Act, 1947, and it runs parallel to Regulation 8(2) of the Food and Drug Regulations, 1973.

To illustrate the type of coverage given, we may take a case heard under both the equivalent 1946 Regulations and the earlier Act: *Department of Health* v. *General Sales and Marketing Manufacturing Ltd.*[59] The defendant marketed a tin labelled "salmon-type steaks" and underneath this statement, in much smaller letters, there appeared the words "N.Z. Kane", a mistake for kanae, a type of mullet. A picture on the label closely resembled a salmon, and the label also appeared to depict cuts of salmon served on a plate. Since the tin did, in fact, contain only mullet, the defendant was convicted and fined $100.[60] Before leaving this survey of recent developments, it is appropriate, perhaps, to examine the enforcement procedures laid down under the Consumer Information Act and the Food and Drug Act.

56 Some, for instance, prescribe standards of composition, or prohibit the sale of any medical device.

56(a) This regulation has been invoked by regulation 5(3) Food and Drug Regulations, 1973.

57 See the Consumer Information (Quantity) Notice, 1971. This came into force on 8th January, 1972. The products concerned are: abrasive cleaners, laundry soap, toilet soap, soap flakes, soap powder, soap powder and enzymes, enzyme cleaning preparations, shaving soap, shaving cream, talcum powder, toothpaste, toothpowder, dentifrices, pet food, liquid soap, shampoo, detergent liquids, blankets, sheets, greaseproof paper.

58 The Consumer Information Act, ss.7 and 8; the Food and Drug Act, s.7.

59 An unreported decision of Izard S.M., 4 November, 1970.

60 The penalties for offences against the Consumer Information Act and the current Food and Drug Act are those as specified, supra. n. 51. Reference should also be made to *Wark* v. *New Zealand Products Ltd.* (1953-5) 8 M.C.D. 23. A label of baked beans in tomato sauce bore the statement "with bacon". Bacon, apparently was present only in a proportion of about 8/1,000ths of bacon to the whole. Such a quantity was not discernible by any of the senses and a conviction was duly registered under s.6 of the Food and Drugs Act, 1947.

Essentially, each Act aims for conciliation. Prosecutions for misleading advertising, packaging or labelling cannot be commenced without Departmental sanction: from the Director-General of Health in the case of offences against the Food and Drug Act; from the Examiner of Trade Practices in cases under the Consumer Information Act. Neither party can give his consent unless a rigorously defined series of consultations with the offender has failed to produce a satisfactory result.[61]

The one exception admitted by each Act is when immediate prosecution is justified or necessary. Where this is so, authority to prosecute can be given without the need for prior consultation.[62]

Control of Sales on Credit

Unsurprisingly, the legislature has most recently been involved with the consumer who buys on credit. This is evidenced by the passing, in 1971, of both a Layby Sales Act and a Hire Purchase Act.

This latter came into force on 1st August 1972 and repealed the Hire Purchase Agreements Act, 1939. The protection given to the consumer under this earlier Act was relatively small. It enabled the courts to reopen, and make adjustments to, contracts of hire purchase which were "harsh and unconscionable".[63] There were also various rights and duties imposed upon the parties in the event of repossession. A formula was laid down by which the amounts owing to the purchaser were to be computed.[64] It was also provided that after repossession, the seller was to retain the goods for 21 days. This was to allow the buyer to offer to make good his default. If the buyer did make such an offer, he had to pay all the money owing within 7 days of his offer.[65]

The protection which was thus afforded to the consumer under the Act of 1939 was incorporated in, and expanded upon, in the recent enactment. A brief summary of this latter would point to the fact that there is now implied into contracts of hire purchase, as with sales of goods, conditions and warranties as to title, fitness for a particular purpose and merchantable quality.

Of perhaps greater interest, although they partially reproduce the Hire Purchase and Credit Sales Stabilisation Regulations, 1957, are those provisions enjoining each contract to meet certain formal requirements. Contracts must be in writing, signed by the purchaser, and describe the goods to which they relate. As well, the agreement will have to state the number of instalments, their separate amounts and the dates on which they are payable.

Furthermore, every agreement, and this on its front page, must contain the financial details of the transactions in the way specified by

61 Food and Drug Act, s.34; Consumer Information Act, s.19.

62 Food and Drug Act, s.34(2); Consumer Information Act, s.20. In the former case, immediate prosecution is mandatory if the offence may have damaged or endangered the health of any person. In the latter, immediate prosecution may be authorised only by the Minister of Industries and Commerce.

63 See *Foley Motors Ltd.* v. *McGhee* [1970] N.Z.L.R. 649. There is a corresponding provision in the Moneylenders Act, 1908, s.3.

64 See s.4. In broad terms, this section stated that if the total of all money paid (including any trade-in) taken with the value of the goods when repossessed *was greater* than the purchase price, the buyer would have been entitled to the excess.

65 Section 6.

the Act itself. Essentially, the requirements are that the cash price must be stipulated, and from this must be deducted any sums paid, by way of deposit. This reveals the amount for which the purchaser requires finance.

Another set of figures is required. These show the charges payable by the purchaser since he is buying on credit, and when the various calculations are duly made, the amount which is being paid in excess of the cash price.

Lastly, honourable mention must be made of two further elements of consumer protection in this Act: the vendor is to be liable for any representations made by the dealer; and the purchaser who pays off ahead of time is entitled to a rebate of some of the moneys paid.[66]

The Layby Sales Act was designed to cope with a form of sale apparently unique to Australia and New Zealand. While layby contracts do vary in their incidents, their chief characteristic is that the customer pays to the trader by instalments the whole of the purchase price before he takes possession of the goods.

That this type of scheme has its vices as well as virtues was illustrated in 1965 when the Northern Linen Co. Ltd, went into liquidation. Of its total debt of $80,000, some $52,000 was in respect of layby customers. Even had the goods which were the subject of the sales been found, it would have been of little avail to these customers. As with most agreements, property was not to pass until all instalments were paid. Most of the customers were young girls saving for their trousseaux. As unsecured creditors, they suffered heavy losses.[67]

The Layby Sales Act (which is to be read as part of the Sale of Goods Act) offers the buyer greater security should the seller become insolvent.[68] The goods concerned are to remain at the seller's risk until they are in the buyer's hands; and should the seller be wound up or become bankrupt, the buyer will be entitled to complete the sale if the seller's assets include the relevant goods. If, however, there remains none, or not enough, of the contract goods to satisfy all the purchasers,[69] their claims on the seller's assets are advanced over those of other unsecured creditors and over creditors secured by a floating charge.[70]

Looking back over the preceding pages, it is tolerably clear that the New Zealand legislature has made a commendable effort on behalf of the embattled consumer. Indeed, there is strong ground for arguing that Parliament has done virtually all it can be expected to do if it is not also to stifle legitimate business enterprise.[71] There could, of course, be a procedural shake-up, so that the various statutes covering the many aspects of consumer law could be brought under the aegis of one

66 See the Hire Purchase Act, 1960-65, s.2(1) (N.S.W.). The Act also contains expanded provisions safeguarding the purchaser in the event of repossession.

67 See Coote, "The Report on Layby Contracts" [1970] Recent Law 177; Lawson, "The Layby Sales Act" (1972) 5 N.Z.U.L.R. 181.

68 The only comparable legislation is the Lay-by Sales Act, 1943, (N.S.W.); and the Lay-by Sales Agreements Ordinance, 1963, (A.C.T.).

69 Priority is given to those who entered layby contracts earlier.

70 The Act also grants the buyer the right to cancel a layby sale and to recover his payments less various expenses incurred by the seller. The seller is also to be compensated for any reduction in the value of the goods.

71 Not, of course, that the Dominion can afford to overlook the recent Supply of Goods (Implied Terms) Act, 1973 (U.K.). Inter alia, this prohibits exclusion of the implied terms as to merchant ability and fitness contained in the Sale of Goods Act.

department, instead of several, as is now the case. But this would, at best, be no more than a tidying up operation.[72]

Better then to urge the development of consumer protection in other fields. To begin with, the advertisers could undertake a rigorous self-examination and look to merit of their own advertisements. There is, in fact, to the writer's own knowledge, a considerable degree of self-regulation by the advertising fraternity.

In another field, however, consumer protection in New Zealand is markedly deteriorating. In the last resort, an educated public is the *sine qua non* of successful consumer legislation. The current tendency for statutes to prohibit contracting-out is laudable no doubt, but ineffective if the buyer is ignorant of the very legislation the seller wishes to avoid.[73] People will still put up with shoddy goods; pay exorbitant interest rates; go through with door to door sales, if they are unaware of a law which seeks to help them in their predicament.

There is indeed a Consumers' Institute in New Zealand which runs a valuable publication entitled "Consumer",[74] and which also acts as a useful pressure group.[75] It also has a weekly 10 minute slot on a national radio programme. But the Institute depends on Government funds, which are not always forthcoming. Thus its activities are, to the utter detriment of the public, often cramped and restricted. But a heartening development has been the Institute's recent decision to set up offices at the four main centres for the reception of consumer complaints.

New Zealand has a small population, but an excellent national coverage in newspapers, television and radio. It also has a highly efficient and respected system of education. The opportunities are thus clearly there for this, indeed, any, government which wishes to capitalise on the good intention of its legislation. The drive henceforth ought to be (though regrettably seems not to be) toward the creation of a public with an informed and sophisticated approach to consumer matters. It would be a pity indeed if the ship were lost for "a ha'porth of tar".

72 Thus, the Food and Drug Act is administered in the Department of Health, the Consumer Information Act in the Department of Industries and Commerce; Weights and Measures legislation in the Department of Labour.

73 The Hire Purchase, and Layby Sales, Act prohibit contracting out. The Door to Door Sales Act does so too. s.12. See, also *supra* n. 71.

74 Like the United Kingdom publication "Which", an important aspect to "Consumer" is testing of various products.

75 Though more publicity seems to go to the small, but highly vocal, CARP; the Campaign Against Rising Prices.